COMMITTEE DECISION OF CHILD CUSTODY DISPUTES AND THE JUDICIAL TEST OF "BEST INTERESTS"*

IN the preceding article Dr. Laurence Kubie has suggested that current modes of child custody disposition following divorce or separation are inflexible and fail to meet the psychological needs of children. In order to remedy these defects he has suggested that upon separation or divorce, parents agree to joint legal custody of their children and concurrently choose a committee to resolve disputes arising out of their possible inability to decide questions concerning their children's welfare. In this agreement parents would promise to send to this committee any dispute upon which they had reached an impasse, and to be bound by its decision, even if only one of them had acquiesced to the submission. And they would choose as members of the committee persons such as psychiatrists, educators and clergymen,[1] presumably equipped to deal with questions of a child's well-being.

Committee settlement of custody disputes may have significant advantages when compared with judicial resolution. One of its more obvious merits is the probable saving to courts of time, money, and resources, and the similar savings gained by parents. More important might be the committee's putative greater competency to discover the child's "best interests" — the goal the law articulates and searches for in custody proceedings.[2] This alleged competency might stem from the specialized training, vocation, and experience of the committee members, from the lack of institutional pressure to reach rapid decisions,[3] and from the possible personal knowledge and proximity of the committee members both to the parents and the child.[4] Other likely merits of the committee are the less tangible, but crucial, emotional benefits to the child. Thus, to the extent that the committee's existence may induce the parents to

*This is a student Note assessing the legal effects of the proposal set out in the preceding article by Lawrence S. Kubie.

1. The American Arbitration Association is now equipped to arbitrate marital disputes between two persons living under a separation agreement. The panel of arbitrators contains lawyers, clergymen and other professionals in the field of social service. The parties may have provided for arbitration in the agreement or may decide to arbitrate particular disputes. This procedure, however, is much more formal than the one Dr. Kubie contemplates, and the arbitrators must be selected from a panel submitted to the parties by the Association. American Arbitration Association, *Marital Disputes Arbitration* (Memorandum, Nov., 1963).

2. See, *e.g.*, CAL. CIV. CODE § 138, Bastian v. Bastian, 81 Ohio L. Abs. 408, 13 Ohio Op. 2d 267, 160 N.E.2d 133 (Ct. App. 1959); Shuffman v. Shuffman, 10 App. Div. 2d 936, 200 N.Y.S.2d 949 (1960); Weinman, *The Trial Judge Awards Custody*, 10 LAW & CONTEMP. PROB. 721, 728 (1944); LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS §§ 14-33 — 14-35 (2d ed. 1961).

3. It seems reasonable to assume that conscientious committees handling few disputes will be able to spend more time deliberating over their determinations than do many judges who are burdened with heavy case loads.

4. Dr. Kubie suggests that the committee be composed of persons acquainted with the parents. Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197, 1200 (1964) [hereinafter cited as Kubie with page number]. Some of the members, then, will probably know the child. The committee might

reach agreement on their own,[5] the child will be spared the possible psychological disturbance of a third party decision concerning his future. And even when the parents cannot reach an agreement, committee settlement, to the extent that its informal procedures stimulate a spirit of compromise and conciliation not engendered by the typical adversary proceeding, may prevent not only detriment to the child which may result from public adjudication of his future, but also emotional upheaval which potentially flows from any acrimonious dispute in which he is involved. A final probable value of the proposed committee system is a consistency of decision and attitude toward the child which may not be guaranteed by the vagaries of court proceedings.[6]

There are, however, possible disadvantages to the proposal. Joint custody itself may be attacked on grounds that it perpetuates a relationship which has been unsuccessful and thus may create more acrimony than single custody, or that it lacks the finality of disposition which may be desirable for the child's feelings of security. The committee mechanism may be vulnerable because the relative ease of access to it as compared to a court — *e.g.*, the informality, privacy and lack of expense — may remove the psychological and economic reluctance of parents to initiate third party proceedings,[7] one of the major incentives to parental agreement regarding custody problems. In addition, resort to the committee may have emotional effects upon the child more adverse than those caused by judicial proceedings. It might be more disturbing, for example, for the child to be examined by a number of committee members than by a single judge in chambers. Even the putative expertise of the committee members may not render them more competent to decide individual disputes than an experienced domestic relations judge. Finally, although the committee may be able to gather empirical evidence and provide explicit advice concerning "best interests," the legal doctrine of "best interests" may be asking for more than the mere opinions of experts. It may de-

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thus be in a better position than is a judge to render a decision that best fits the particular circumstances of the child and his parents.

On the other hand, that the committee members are friends of the parents may prove troublesome. The committee, for example, may be so concerned with not hurting either parent that it may render a compromise solution when the child's best interests require that one of the parent's proposals be adopted *in toto*. Or, by the time the committee, chosen at the time of the agreement, is called upon to decide a dispute, some of the members may be more friendly with one parent than the other, leading to bias or, possibly, "leaning over backwards," either of which could be detrimental to the child's best interests. Kubie provides for changing committee members, *id.* at 1198-99, but parents, not contemplating the immediate use of the committee, may be reluctant to invoke this procedure for personal reasons such as the fear of alienating someone who supposedly is a friend.

5. Dr. Kubie feels that the committee will have this effect. *Id.* at 1200. Lindey agrees. LINDEY, *op. cit. supra* note 2, at 29-30.

6. Each time the parents want a judicial determination of a custody problem, the proceeding may be held before a different judge. Even when the same judge is involved, his vast case load may cause him to treat the child as "just another case" rather than as an individual with particular problems. A committee, however — especially one whose members are in constant contact with the parents — is better able to fit the immediate issue into the context of the child's past history and particular circumstances.

7. *Contra*, see note 5 *supra*.

mand a community consensus, expressed through the courts, as to the values which the community desires to maximize in child custody dispositions.

Whether the advantages of Dr. Kubie's proposal outweigh the disadvantages may be a question of individual preference or a subject for further psychological study; but an inquiry into the threshold question of how courts can or ought to react to situations arising out of a committee agreement appears important and fruitful — for both the lawyer advising his client and the court faced with a committee agreement. If a parent, for example, requests a court either to stay the committee proceedings or to preempt the committee by deciding a current dispute and the other parent simultaneously requests that the judicial proceedings be stayed,[8] *must* the court, even if it believes that the committee is not the best means for determining the child's "best interests," enforce the original agreement and permit the committee to act? Or are there principles of family law or arbitration law which would allow the judge to override the agreement? If the court is not *bound* to allow the committee to act, does family law or arbitration law *prohibit* the judge from sending a dispute to the committee, even when he favors committee settlement? Analogous questions arise when a parent refuses to abide by a committee decision and the other seeks judicial enforcement. Must (or may) the court enforce this determination as it enforces commercial arbitration awards?[9] Or must (or may) it undertake substantive review? And upon review, what weight should be given to the committee's decision? Finally, will the answers to these questions differ, depending upon whether the committee provision is embodied in a bare separation agreement or is one incorporated into a judicial decree?[10]

In investigating the legal effect and enforceability of committee action, the preliminary issue is whether or not the committee is properly classified as an "arbitration" panel subject to the doctrines of arbitration law. It might be argued that because one parent may submit a dispute to the committee without the consent of the other, its powers are different from those of an arbitration panel. But this distinction seems artificial since the committee satisfies the fundamental definition of an arbitrator — "A private, disinterested person, chosen by the parties to a disputed question for the purpose of hearing their

8. As will be shown subsequently, see note 11 *infra* and accompanying text, the committee must be treated as an arbitrating agency. Thus one is likely to use arbitration procedure when faced with problems concerning the committee.

See, *e.g.*, ILL. ANN. STAT. ch. 10, § 102; N.Y. CIV. PRACT. LAW & RULES § 7503; UNIFORM ARBITRATION ACT § 2 and 6A CORBIN, CONTRACTS § 1443, at 432 (1962).

9. Normally, a court does not review the substance of an arbitration award and will only vacate in extreme cases such as where fraud or corruption was present or the arbitrator exceeded his power. See, *e.g.*, N.Y. CIV. PRACT. LAW & RULES § 7510 (1963); CAL. CODE CIV. PROC. § 1286.2 (1961). But courts will sometimes vacate an award on the merits because it is against public policy. See note 55 *infra* and accompanying text.

10. Where the parties seek a divorce or separate maintenance decree, they may submit their separation agreement to the court to be incorporated into and made a part of such decree. If a merger takes place, "the contract as such loses its efficacy and the force behind a judgment takes its place." BURBY, LAW REFRESHER: DOMESTIC RELATIONS 63 (1960). Where the parties separate without obtaining a judicial decree or do not have the agreement incorporated into the decree, the agreement is treated as an ordinary contract.

contention and giving judgment between them. . . ."[11] Most states have arbitration statutes which provide that, "[M]ost . . . agreements to arbitrate future disputes are lawful and valid."[12] In these states, courts should refuse to hear a complaining parent and should permit and enforce the agreement[13] — whether or not it is incorporated into a divorce or separate maintenance decree — unless family law objections render the arbitration against public policy.[14] In a few states, however, an agreement to arbitrate future disputes may always be revoked by either party.[15] In such states, if Kubie's provision appeared in a bare separation agreement, one not incorporated into a divorce or separate maintenance decree, a judge could not send a dispute to the committee if either parent objected. However, it might be possible to avoid this common law rule where the agreement has been incorporated into a court order by arguing that because the committee provision was part of a court established procedure for settlement of disputes concerning the child rather than a mere agreement between the parties, neither party could unilaterally restrain its operation.[16]

Where arbitration law seems to require performance of the committee agreement, it must be determined whether the immense power of the courts in custody proceedings, derived from the court's conception of itself as *parens patriae*[17] to the children involved, would prevent or affect the enforceability of the agreement. Custody agreements are not *ipso facto* void, but no agreement between parents can deprive a court of its jurisdiction over children.[18] If the court feels that the agreement is in the best interests of the child, it may incorporate the agreement into a divorce or separate maintenance decree.[19]

11. BLACK, LAW DICTIONARY 135 (4th ed. 1951). In Erlich, Inc. v. Unit Frame & Floor Corp., 5 N.Y.2d 275, 279 (1959), the court said, "arbitration is but a substitute for the judicial process, with the parties creating their own forum and picking their own judges."

12. 6A CORBIN, CONTRACTS § 1443, at 431 (1962). See, *e.g.*, N.Y. CIV. PRACT. LAW & RULES § 7501; CAL. CODE CIV. PROC. § 1281.

13. 6A CORBIN, CONTRACTS § 1443, at 432 (1962).

14. See notes 36-42 *infra* and accompanying text.

15. In most common law jurisdictions an agreement to arbitrate all future disputes that might thereafter arise was unenforceable. 6A CORBIN, CONTRACTS § 1443 (1962). While this result has been changed by statute in most states, see note 4 *supra*, a few states do not have such statutes, leaving the common law rule applicable. See, *e.g.*, Boughton v. Farmers Insurance Exchange, 354 P.2d 1085 (Okla. 1960).

16. Once a separation agreement is incorporated into a court decree it becomes part of the court order and is treated as a judgment of the court having the usual attributes of a judgment. 17 AM. JUR. *Divorce and Separation*, § 822 (1957); BURBY, *op. cit. supra* note 12, at 63. But courts always retain the power to modify custody decrees. See Bronson, *Custody on Appeal*, 10 LAW & CONTEMP. PROB. 737, 738 (1944).

17. See, *e.g.*, LINDEY, *op. cit. supra* note 2, at § 14-30; Matter of Bull, 266 App. Div. 290, *sub nom. In re* Hellman, 42 N.Y.S.2d 53 (1943), *aff'd*, 291 N.Y. 792, 53 N.E.2d 368 (1944); Matter of Hill, 199 Misc. 1035, *sub nom.* Hill v. Hill, 104 N.Y.S.2d 755 (Sup. Ct. 1951).

18. See LINDEY, *op. cit. supra* note 2, at §§ 14-2, 14-29 and authorities cited therein.

19. Weinman, *supra* note 2, at 731; 17A AM. JUR. *Divorce and Separation*, § 822 (1957).

But, if it believes that the agreement does not work to the advantage of the child, it can invalidate the custody provisions and impose new custodial terms, without disturbing the remainder of the agreement.[20] Moreover, a court order with respect to either the major elements or the incidents of custody[21] is never final, but is usually considered subject to modification if the "best interests" of the child so require, notwithstanding the fact that the decree incorporated an agreement between the parents.[22] A custody agreement not incorporated into a court order also may be modified by a court.[23] The broad power of the court is further evidenced by the fact that in many states the court retains jurisdiction to decide custodial matters even if a divorce or separation is denied, under the theory that, once acquiring jurisdiction, the court can grant full relief.[24] And in some states statutes permit either parent to bring an action for the exclusive control of the children, even though no divorce is applied for, with the decree subject, of course, to modification.[25] Furthermore, courts often ignore the procedural incidents of trial, refusing to allow technical considerations to impede their determinations of the child's best interests.[26] Final-

20. LINDEY, *op. cit. supra* note 2, at § 14-2.

21. For the purposes of this Note, the various aspects of custody have been divided into two rough categories; the "major elements," consisting of matters such as with whom the child shall live and visitation rights, and "incidents," consisting of matters like vacations, schooling and medical treatment. This distinction is suggested by LINDEY, *op. cit. supra* note 2 at § 14-5.

22. See LINDEY, *op. cit. supra* note 2, at § 14-30; Weinman, *supra* note 2, at 731 and Annot., 73 A.L.R.2d 1444 and authorities collected therein. Cases in which custody orders have been modified are legion. See, *e.g.*, Bastian v. Bastian, 81 Ohio L. Abs. 408, 13 Ohio Op.2d 267, 160 N.E.2d 133 (Ct. App. 1959) (with whom the child should live); Bernstein v. Bernstein, 80 Cal. App. 2d 921, 183 P.2d 43 (Ct. App. 1947) (visitation rights); Frizzell v. Frizzell, 158 Cal. App. 2d 652, 323 P.2d 188 (Ct. App. 1958) (schooling). This result may be provided for by statute, as well as being part of the court's inherent power as *parens patriae*. See, *e.g.*, CAL. CIV. CODE § 138.

23. Sullins v. Sullins, 280 P.2d 1009 (Okla. 1955).

24. Bronson, *Custody on Appeal*, 10 LAW & CONTEMP. PROB. 737, 738 (1944).

25. See, *e.g.*, CAL. CIV. CODE §§ 199, 214.

26. See, *e.g.*, Stokowski v. Lumet, 17 Misc. 2d 735, 191 N.Y.S.2d 617 (Sup. Ct. 1959), in which the court ruled that even though the petitioner, seeking modification of the custody order, had procedurally failed to establish a basis for court action, the issue of the health and welfare of children was before the court and must be determined, as, "The proceedings are not technical; the welfare of the children does not depend upon the whim of the parents, nor should it depend on the skill of counsel in trying the issues." *Id.* at 737, 191 N.Y.S.2d at 619. The court added that once a court acquires jurisdiction in a custody proceeding, the parties cannot withdraw without the court's approval and the petition will only be dismissed upon the merits. There is no question of burden of proof and the court on its own motion can seek expert opinion.

While there are jurisdictional problems in the law of custody, see generally Note, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees?*, 73 YALE L.J. 134 (1963), that the divorce decree was granted in a foreign state will not usually prevent a court so disposed from modifying the decree if the child involved is a resident of the state. See, *e.g.*, Stout v. Pate, 120 Cal. App. 2d 699, 261 P.2d 788 (Ct. App. 1953); Matter of Bull, 266 App. Div. 290, *sub nom. In re* Hellman, 42 N.Y.S.2d 53 (1943), *aff'd*, 291 N.Y. 792, 53 N.E.2d 368 (1944).

ly, the court possesses broad discretion, which is difficult to upset on appeal.[27] This discretion is necessitated by the individuality of each child, the subjective nature of the "best interests" doctrine[28] and the consequent need for a decision-maker who has the parties before him. An appellate court thus finds it extremely difficult to say that there was no evidence upon which a reasonable judge could have based his decision. To limit the scope of the trial court's discretion, appellate courts have developed the rule of "changed circumstances,"[29] which holds that a custody order may not be modified unless circumstances have so changed since the grant of the original decree that the child's best interests warrant modification, or there is a showing that the facts warranting modification were unknown to the party urging them at the time of the prior order and could not with due diligence have been ascertained.[30] But trial courts can almost always find changed circumstances — the age of the child, for example,[31] if nothing else — and, in fact, are seldom reversed on this ground.[32]

In light of its broad and equitable[33] power over custody, a court faced with a committee provision in a separation agreement, whether or not the agreement is incorporated into a court order, would not be compelled to send a dispute to the committee or to accept the committee's decision; under principles of family law the court would still retain the power to modify or reject the

27. See, *e.g.*, 17A AM. JUR. *Divorce and Separation*, § 817 (1957); DiGiorgio v. DiGiorgio, 87 Cal. App. 2d 576, 197 P.2d 213 (Ct. App. 1948); Horsley v. Horsley, 77 Cal. App. 2d 442, 175 P.2d 580 (Ct. App. 1946).

28. See generally Note, 73 YALE L.J. 151 (1963).

29. Curbing judicial discretion is not the only reason for the rule. It is also a means of curbing senseless litigation by preventing dissatisfied parties from keeping the courts continuously occupied with petty grievances and with hearing evidence of events occurring prior to the issuance of the custody decree. Peterson v. Peterson, 64 Cal. App. 2d 631, 149 P.2d 206 (1944).

30. Gantner v. Gantner, 39 Cal. 2d 272, 246 P.2d 923 (1952).

31. Bernstein v. Bernstein, 80 Cal. App. 2d 921, 183 P.2d 43 (Ct. App. 1947).

32. *But cf.*, *e.g.*, Bachman v. Mejias, 1 App. Div. 2d 319, 151 N.Y.S.2d 48 (1956), where the New York court reversed in the mother's favor a lower court modification of a Puerto Rican custody order, saying the evidence was insufficient to warrant a finding of a "change of circumstances." This type of ruling is rare, however, and the court was influenced here by the fact that by coming to New York the mother had flaunted a Puerto Rican court order directing her to bring the child to Puerto Rico for disposition as the Puerto Rican court saw fit. See also Johnson v. Johnson, 72 Cal. App. 2d 721, 165 P.2d 552 (1946).

The use of the rule as a curb on judicial discretion has been further eroded by statements that it is not ironclad and that a court might be justified in modifying a custody order even if there has been no "change in circumstances." See, *e.g.*, Bernstein v. Bernstein, *supra* note 31; Peterson v. Peterson, 64 Cal. App. 2d 631, 149 P.2d 206 (1944).

The rule, in fact, allows broad judicial discretion in the opposite sense in that, if the court wants to uphold the original order, by finding no change in circumstances it can refuse to hear evidence of the parties' conduct prior to the issuance of the order. Gantner v. Gantner, 39 Cal. 2d 272, 246 P.2d 923 (1952), and Sutera v. Sutera, 1 App. Div. 2d 356, 150 N.Y.S.2d 448 (1956).

33. See Bronson, *supra* note 24, at 738.

committee provision if it found that the best interests of the child so required.[34] However, a court which decides that the committee mechanism for solving disputes arising out of a joint custody is generally desirable — and desirable in the case before it[35] — may want to enforce the agreement unless precluded from doing so by the doctrine that agreements to arbitrate which are against public policy will not be enforced.[36] It might be contended that the agreement violates public policy in that its enforcement would involve the court's abandonment of its custody-regulating function in favor of a third party. The precise question of whether a committee plan frustrates public policy in this manner has yet to come before a court; but in New York two cases have presented a virtually identical issue.[37] In *Hill v. Hill*[38] the court, faced with an arbitration provision in a separation agreement, denied a motion to compel arbitration of a dispute involving visitation rights and the child's home, holding that such matters "are not properly the subject of arbitration."[39] This ruling was followed in *Michelman v. Michelman*,[40] where the court denied a motion to compel arbitration of a controversy involving visitation rights, saying that since arbitrators need not "follow the law,"[41] the courts have in certain situations involving public policy set aside awards in conflict with such policy and have refused to direct arbitration in such situations. The court declared that "the well-being of this child as it will or may be affected by visitation rights can only be determined on a hearing."[42] The implicit rationale of both these broadly phrased opinions, which seem to go beyond the specific fact situations to lay down a general rule of law, appears to be that arbitration of child custody disputes is against public policy because only a

34. See notes 18-23 *supra* and accompanying text.

35. It is possible that a judge could approve generally of the committee as a device for solving custody disputes, yet feel that in the case before him the child's best interests would be best served by a judicial determination. For example, he might not approve of the particular committee members, he might feel that he is better equipped to handle a particular problem than the committee, or the case might be one in which time is of the essence and for some reason the court could act more quickly than the committee.

36. See, *e.g.*, Domke, *Arbitration*, 30 N.Y.U.L. REV. 633, 637 (1955); Wilco v. Swan, 346 U.S. 427 (1953); Knickerbocker Agency v. Holz, 4 App. Div. 2d 71, 162 N.Y.S.2d 822, *aff'd*, 4 N.Y.2d 245, 173 N.Y.S.2d 602 (1957); Kabinoff v. Kabinoff, 19 Misc. 2d 15, 163 N.Y.S.2d 798 (Sup. Ct. 1957).

37. No such cases in other jurisdictions have been discovered.

38. 199 Misc. 1035, 104 N.Y.S.2d 755 (Sup. Ct. 1951).

39. *Id.* at 1038, 104 N.Y.S.2d at 758. This was quoted from a dictum in Waltman v. Waltman, 103 N.Y.L.J. 221 (Jan. 15, 1940), the first case in which the question of the arbitrability of a custody dispute arose, where the court said,

> It may not, however be amiss for the court to express its opinion that such matters as the custody of a child and the right of visitation are not properly the subject of arbitration, depending for their determination upon a judicial finding as to the best interests of the child.

Id. at 221.

40. 5 Misc. 2d 570, 135 N.Y.S.2d 608 (Sup. Ct. 1954).

41. *Id.* at 570, 135 N.Y.S.2d at 608. Here the court seems to have meant that the arbitrator would not necessarily have ruled in the child's best interests but might rather have given weight to other considerations.

42. Michelman v. Michelman, 5 Misc. 2d 570, 135 N.Y.S.2d 608, 609 (Sup. Ct. 1954).

court can determine a child's best interests. If the reasoning of these cases is followed, when the court is faced with the question of whether it should send the dispute to the committee or undertake an immediate determination itself, the court will surely choose the latter alternative.

However, a judge desirous of permitting a custody dispute to be decided by the committee or of enforcing a committee judgment might employ three limited arguments for distinguishing *Hill* and *Michelman* in specific fact situations.[43] The first would be that *Hill* and *Michelman* do not apply because they were concerned with a standard arbitration clause rather than a committee arrangement such as Kubie suggests. The courts there were faced with the spectre of a third party agency composed of a single man—a man whose identity and ability might not have been known to them — whereas the court presented with the possibility of committee resolution can investigate the competence of the members, and can rely on a presumption that three men in concert are more likely to arrive at a correct decision than is a single person.[44] But to the extent that the committee is a third party mechanism for the settlement of a dispute, it is functionally equivalent to an arbitrator, and in light of the rationale of *Hill* and *Michelman*,[45] it is doubtful that courts would find the difference in labels a meaningful distinction. A second possible argument would point out that *Hill* and *Michelman* were concerned with major elements of custody: visitation rights and the child's home. Where only an incident of custody such as vacations or schooling is involved, it might be contended that the state is less concerned with making the decision,[46] thus distinguishing these cases. This was done in *Friedberg v. Friedberg*,[47] where the court held that the issue of the selection of the child's school and the payment of tuition — incidents of custody — could be arbitrated, specifically distinguishing *Michelman* on the ground that visitation rights — a major element of custody — were involved there.[48] Thirdly, where a court is confronted with a separation agreement which has been incorporated into a judicial decree rather than one that stands alone,[49] as appears to be the situation in *Hill* and *Michelman*,

43. Outside New York, of course, *Hill* and *Michelman* have little value as precedent, but they are indicative of judicial reasoning on the subject of third party settlement of custody disputes and they would most likely be cited by counsel opposing the submission of the dispute to the committee. In New York, being only Supreme Court decisions, no other court is bound to follow them but they would have some persuasive effect.

44. It might also be thought that the presence of the child's trusted ally (see generally Kubie) differentiates the committee proceeding from arbitration in that it assures that the child's, as well as the parents', interests will be represented.

45. This rationale seems to be that only a court and not a third party tribunal can determine a child's best interests. The *Hill* and *Michelman* courts never mention whether they know the identity of the arbitrators, probably because any knowledge of the arbitrator's competency would have had no bearing on their decision.

46. LINDEY, *op. cit. supra* note 2, at § 29-16.

47. 23 Misc. 2d 196, 201 N.Y.S.2d 606 (Sup. Ct. 1960).

48. The *Friedberg* court was content to leave the distinction as one between visitation rights and schooling. It never made the generic distinction between major elements and incidents of custody.

49. See note 10 *supra*.

it might be urged that the committee provision is not a "mere arbitration clause" conflicting with family law policy, but is rather a court order spelling out custodial rights and procedures and directing that certain controversies between the parents be settled in a designated manner. The rationale for this distinction is that the court approving the agreement has already found that the committee mechanism does not violate public policy and that the court faced with a dispute arising out of that agreement is merely carrying out the previous order.[50] These last two arguments, however, are rather artificial in that they rely on verbal distinctions and ignore the main rationale of *Hill* and *Michelman* — that a third party tribunal is not a proper means for discovering a child's best interests in a custody dispute. This rationale is not mitigated by the importance of the subject matter or by the fact that a court has previously passed on the agreement. In addition, these means of distinguishing *Hill* and *Michelman* would not be available in a case where the major elements of custody were involved and the separation agreement stood alone.

Because of the difficulty in distinguishing *Hill* and *Michelman*, it seems only proper that a court which is asked to decide a dispute itself, yet is convinced of the committee's value and desirous of submitting to it the particular issue, should face the problem squarely by refusing to follow those cases. That there seems to be no reason to fear arbitration in a family law setting has been recognized in a line of New York decisions where the support and maintenance of a mother and her children have been held arbitrable.[51] In *Robinson v. Robinson* [52] the lower court stated:

> Fixing the amount which a husband shall pay for the support of his wife and children is something which our courts are doing practically every day, and the discouragement of litigation over that subject is so plainly in the public interest that I would have supposed that no question could be raised as to the right of the parties to agree upon another tribunal to do the same thing.[53]

To the extent that support payments affect a child's welfare as much as custody, no distinction between these cases and the custody disputes is tenable. There is no point, for example, in deciding if a child should go to a private

50. By accepting this argument, however, the court would be merely deceiving itself, for if arbitration of custodial disputes is *ipso facto* contrary to public policy, no prior determination could render it in keeping with that policy. Furthermore, when the parents have mutually agreed to a separation agreement and the divorce or separation is granted, the agreement is often added to the decree *in toto* without so much as a glance from the judge.

51. See, *e.g.*, Robinson v. Robinson, 296 N.Y. 778, 71 N.E.2d 214 (1947); Lasek v. Lasek, 13 App. Div. 2d 242, 215 N.Y.S.2d 983 (1961); Dowell v. Berger, 127 N.Y.L.J. 2274 (June 6, 1952). In *Robinson* and *Lasek* the separation agreements appear to have been standing alone, while in *Dowell* the agreement was incorporated into a divorce decree. The courts did not distinguish between the situations but this would have been unnecessary since arbitration was upheld in all three cases.

52. 186 Misc. 974 (Sup. Ct. 1945).

53. *Id.* at 976. This decision was reversed by the Appellate Division, 271 App. Div. 98 (1946), but was subsequently affirmed without written opinion by the Court of Appeals, 296 N.Y. 778, 71 N.E.2d 214 (1947), and the inference may be drawn that the Court of Appeals approved of the quoted language.

school, if a previous arbitration panel has awarded him fifty dollars per month support.

The basic reason, however, for not fearing arbitration and for refusing to follow *Hill* and *Michelman* is that enforcement of the committee agreement would be unlikely to result in a decision contrary to the child's best interests. This conclusion can be reached by treating the committee device in either of two ways. A bold judge, convinced that a Kubie-type committee is as likely as a court to arrive at decisions in the best interests of a child, could use this determination to say that there is no public policy against committee determination of child custody disputes; under arbitration law he would then send the dispute to the committee.[54] If the committee's decision were later challenged by the losing party, the judge — *per se* objections to the committee having been disposed of in the earlier hearing — would continue to apply arbitration law, upsetting the committee's determination only if it were contrary to public policy.[55] This would mean that the court would review the decision only if the allegations of the complaining party were sufficient, if proven, to hold that the decision had been decidedly contrary to the child's best interests.[56] The burden of non-persuasion would be on the complaining parent in such a hearing, and a judge desirous of fostering the committee's device, could "honestly" uphold a committee determination that he himself might not have reached.[57] If the committee were viewed in this manner, it appears unlikely that many parents would even attempt to challenge a committee decision. But at the same time the court would retain the power to

54. Since the goal of the law in this area is to discover the child's best interests, by determining that a committee is as qualified as a court to discover a child's best interests, the judge will also have determined that there is no public policy against sending the dispute to the committee. See note 2 *supra*. Thus neither arbitration law, see note 36 *supra*, nor family law prevents him from allowing the committee to act.

55. Wainwright v. Globe Indemnity Co., 25 Misc. 2d 212, 210 N.Y.S.2d 186 (Sup. Ct. 1960), the court said,

> The court will not lend its power to the enforcement of the kind of decision in arbitration which it would neither allow nor enforce as a subject of an action maintained before it directly.

Id. at 214, 210 N.Y.S.2d at 189. Thus, it added, awards have been vacated which are illegal in result or contractual inception, which otherwise violate public policy as in matters of *infant custody*, which are illegally erroneous on their face and which are punitive and excessive in damages. See also Publishers' Ass'n v. Newspaper Union, 280 App. Div. 500, 114 N.Y.S.2d 401 (1952); Franklin v. Nat. C. Goldstone Agency, 23 Cal. 2d 628, 204 P.2d 37 (1949); and Comment, *Judicial Review of Arbitration: The Role of Public Policy*, 58 Nw. U.L. Rev. 545 (1963). See note 9 *supra*.

56. In *Michelman* the court pointed out that a court could refuse to enforce an arbitration award that was against public policy, but failed to realize that this doctrine mitigated the non-judicial nature of the determination of the child's best interests.

57. Because of the highly subjective nature of the "best interests" test and the inherent lack of certainty that any given decision is better than many of its alternatives, a judge could easily find that, although the committee's decision was not the one he would have made *de novo*, he cannot be certain that his choice is more likely to serve the child's best interests than is the committee's. Only where he can be certain of this is the committee's decision contrary to public policy.

reverse the committee whenever its decisions were demonstrably not in the child's best interests.[58] It must be realized, however, that this method of adjudication is not only contrary to the rationale of *Hill* and *Michelman*,[59] but might also be partially at variance with the idea that in custody proceedings a court will always grant a full hearing and will not abrogate any of its decision-making function, even in favor of a court-appointed social worker or psychiatrist.[60] The approach would thus be open to attack upon appeal, and would probably be upheld only if the appellate court could be convinced that committees approved by courts were as competent as judges to decide custody questions.

There is, however, a path more in line with current doctrine which the favorably disposed court might follow to render the committee a feasible alternative for settling custody disputes. First, as in the previous approach, the

58. One possible difficulty with this approach is that the committee might render a decision which is contrary to the child's best interests, but which the court would never get a chance to review because both parents were satisfied. But, if the court were to allow the child, either himself or through a third party, possibly his "trusted adult ally," Kubie at 1199, to protest a committee decision, this would further insure that his best interests would not be jeopardized by the committee plan. Whether the court would grant the child standing to object to the committee's decision is problematical. Normally, a child does not have party status in a custody proceeding, see generally Goldstein & Katz, Materials on Family Law 482-514 (1963) (unpublished materials on file in Yale Law Library), although the court may seek his views. Furthermore, neither the child nor a third party may normally move to modify a custody decree or a separation agreement. Except under a "neglected child" statute, see, *e.g.*, ILL. ANN. STAT. ch. 23, § 2006 (Supp. 1964), parties other than one's parents usually have no right to bring the court questions affecting the child. One of the reasons for the child's lack of party status, however, is the reluctance of the state to interfere with the parents' right to control their children; the state usually will only step in when it is asked; *e.g.*, a motion to modify a custody decree. But, where the parents have ceded part of their control over their children to a third party, a committee, the state might feel that it now can interfere, if necessary, even if the parents are satisfied, to assure itself that the child's best interests are being served. One way for the state to do this would be for it to allow either the child or a third party to protest a committee decision. In addition, the "trusted adult ally" presents a convenient means for such disputes to be presented to the court, something that is lacking in the normal custody situation.

59. The courts in *Hill* and *Michelman*, it must be remembered, felt that a third party tribunal could not be entrusted with any part of the decision-making process.

60. "The trial court cannot delegate to anyone the power to decide questions of child custody." Annot., 35 A.L.R.2d 629, 651 (1954). Thus in Fewel v. Fewel, 23 Cal. 2d 431, 144 P.2d 592 (1943), the court quoted from Washburn v. Washburn, 49 Cal. App. 2d 581, 122 P.2d 96, saying,

> The power of decision vested in the trial court [in custody cases] is to be exercised by a duly constituted judge, and that power may not be delegated to investigators or other subordinate officials or attaches of the court, *or anyone else.* [Emphasis supplied.]

Id. at 436, 144 P.2d at 595. See generally Annot., 35 A.L.R.2d 629 and authorities cited therein.

It must not be forgotten, however, that here the judge has not entirely given up his ultimate power of decision since he can still overturn the committee determination, if necessary.

court must make the determination that it is not against public policy — *i.e.*, not against the child's best interests — for the committee to initially decide the dispute. But in refusing to decide immediately and permitting the committee to act, the court need not cede any of its power to the committee. By combining the arbitration law doctrine that courts may set aside arbitration awards in conflict with public policy [61] with the court's power to review any custody order when circumstances have changed,[62] the court could grant a *de novo* hearing in order to determine whether the decision was in the child's best interests whenever a committee's decision were challenged.[63] If the judge merely sent every dispute to the committee, and then, when his jurisdiction was invoked again, reviewed each conflict *de novo*, the child's best interests surely would not suffer from the lack of a proper forum to determine them; but the length of the process itself might result in such harm that a judge might be reluctant to send the controversy to the committee in the first place. Three steps would be necessary to arrive at a final decision — a preliminary judicial determination to decide whether the dispute should go to the committee, a committee proceeding to discover what is in the child's best interests and a judicial review to determine whether the committee solution really is in his "best interests." Such a three-step process would be likely to prevent the realization of some of the substantive advantages claimed for the committee:[64] It is doubtful whether such an extended process would result in savings of time, money and resources to either the court or the parents, and it seems likely that few of the putative psychological advantages would be achieved. But the judge should look beyond the immediate case and not allow the spectre of the three-step process to prevent implementation of what he, by hypothesis, thinks is a beneficial means for advancing a child's best interests. For the threat of a three-stage procedure in subsequent disputes can be substantially minimized by strong opinions in the early cases. If judges in the first stage refuse to stay committee action and refuse to decide the case immediately, indicating in their opinions that they favor the committee idea generally rather than just in the specific case before them, later disputants will presumably be deterred from going into court in an effort to bypass the committee.[65] The court should not fear acting decisively even when allegations of committee bias are before it, for the court retains the ultimate power to review the committee's decision.

Given this power of review *de novo*, however, the judge who wishes to enhance the committee's effectiveness by discouraging parents from seeking review of its decisions is still faced with a problem. For, if he finds on review that a disposition different from the committee's would be more in the

61. See note 55 *supra* and accompanying text.

62. See notes 29-32 *supra* and accompanying text.

63. See note 58 *supra*.

64. See notes 2-6 *supra* and accompanying text.

65. This should be especially true since, absent the possibility of committee bias, there will be little rational reason for a parent to object to the committee before it acts.

child's best interests, he is bound to enter that judgment, and such an occurrence would encourage at least a two step process — committee determination and court review — which would have many of the same disadvantages as a three step process. But a judge who is well disposed toward the committee is unlikely to reverse its findings except when they are clearly erroneous. For although, theoretically, in a *de novo* hearing the committee opinion should be treated merely as expert opinion, in practice a judge favorably disposed to the committee idea is likely to review the committee in much the same fashion as an appellate court reviews a trial court, giving a strong presumption of correctness to the committee's determination. Consequently, he is likely to reverse infrequently. And this in turn is likely to result in parents [66] appealing to the court only those committee determinations which are demonstrably unfair — precisely those committee decisions which even the favorably disposed judge *wants* to review. Moreover, it is doubtful that parties who originally thought the committee idea preferable to court settlement of dispute will want to engage in drawn-out custody battles which they have very little chance of winning; and, litigation being quite expensive, expense alone may deter parents from invoking the court at any stage of the process. To the extent that the foregoing analysis accurately depicts the response of potential litigants to broadly written opinions in the early cases challenging the committee device, the incidence of three-step, or even two-step, proceedings is likely to be minimal. Thus, it is possible for the court, without surrendering any of its prerogatives in custody matters, to establish the committee device as a feasible mechanism for solving custody disputes between parents.

66. See note 58 *supra.*

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